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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 164

SUMIO MADOKORO, in behalf of SANNOSUKE MADOKORO, and SANNOSUKE MADOKORO,

Petitioners,

vs.

ALBERT DEL GUERCIO, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, District No. 16.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

This petition for certiorari seeks review of a decision of the United States Circuit Court of Appeals for the Ninth Circuit in which that Court considered the effect of section 13 of the Immigration Act of 1924 upon section 3 of the Immigration Act of 1917, the construction of the Regulations issued under those Acts, and the content of the due process clause of the Constitution of the United States with respect to the right to counsel in deportation proceedings. On the basis of these considerations the Circuit Court affirmed the order of the District Court of the United States for the Southern District of California, Central Division, discharging a writ of habeas

corpus theretofore issued, dismissing the petition for the writ, and remanding petitioner Sannosuke Madokoro[1] to the custody of immigration authorities for deportation. The opinion of the District Court [R. 11-15] is not reported; the opinion of the Circuit Court [R. 74-80] is reported in 160 F. (2d) 164.

Jurisdiction.

The judgment of the United States Circuit Court for the Ninth Circuit was entered February 27, 1947 [R. 80-81]; and a petition for rehearing was denied on April 4, 1947 [R. 81]. The issues as to which petitioner seeks this Court's review, involving construction of Federal statutes and of the Constitution of the United States, were decided adversely to petitioner, over petitioner's argument, by the Circuit Court [R. 74-80]. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

Questions Presented.

1. Whether petitioner is deportable under Section 14 of the Immigration Act of May 26, 1924 (section 214, Title 8, United States Code) on the basis that he made an illegal entry into the United States when he crossed the Mexican border on December 26, 1926, after an absence from the United States of a few hours. Whether he is

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[1]The term "the petitioner" will be hereinafter used to refer to Sannosuke Madokoro.

deportable on this basis although he was then admitted by Customs officials, although he then had an unrelinquished domicile in the United States of over seven consecutive years' duration, and although section 3 of the Immigration Act of February 5, 1917 (section 136(p), Title 8, United States Code), and the Regulations pursuant thereto, provide that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor." Whether such border-crossing is to be deemed prohibited, and such section 3 is to be deemed modified, in so far as aliens ineligible to citizenship are concerned, by section 13(c) of the Immigration Act of May 26, 1924 (section 213(c), Title 8, United States Code) prohibiting admission of aliens ineligible for citizenship.

2. Whether petitioner was denied the right to counsel in the proceedings for his deportation, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

Statement of the Case.

Petitioner filed a petition for a writ of habeas corpus in the District Court for the Southern District of California, Central Division, praying therein for his release from the custody of immigration authorities, by whom he was held under a warrant of deportation purportedly issued under section 14 of the Immigration Act of May 26, 1924 [R. 2-6].

Facts.

The uncontroverted facts, as shown by the petition and return, are that petitioner is an alien of Japanese ancestry and nationality [R. 3, Tr. 2][1a] Since entering the United States in 1915,[2] petitioner has resided continuously in this country [R. 40, 12; Tr. 3-4]. During the period from 1918 to 1926 he was interested in a farm in Mexicali, Mexico, and he frequently crossed the border for a few hours to work on it [R. 45, Tr. 4]. He never remained longer, however, than a half a day at a time [R. 12]. His last such trip was on December 28, 1926; on that day he went to Mexicali for a half a day and returned to the United States at Calexico, California, where he was admitted by Customs officials[3] [R. 13, Tr. 6].

Thereafter, petitioner continued to reside in the State of California, engaged in the business of hauling vegetables, until the institution of the program of detention of aliens of enemy nationality shortly after the declaration of war on December 7, 1941 [R. 34]. On February 18, 1942, petitioner was apprehended as an alien enemy and

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[1a]The abbreviation "Tr." refers to the typewritten transcript of the deportation proceedings which was an exhibit at the hearing in the District Court. It was not printed in the Circuit Court but was considered by that Court in its original form. It was forwarded to this Court and is here in its original form.

[2]Petitioner entered by deserting the ship on which he was a crew member, but the period of three years for which he might have been deported because of this type of entry has long since expired, and the order of deportation is not based on such entry.

[3]As to the question raised in the lower courts of whether petitioner possessed, a border-crossing identification card at the time of such admission, it appears that petitioner's card had then expired. However, this circumstance in no way affects the issue of the legality of petitioner's admission. The card was issued merely for convenience in order to expedite re-admission of persons frequently crossing the border and was not a requirement for such re-admission.

interned at Tujunga, California [R. 33]. On February 22 he was taken from Tujunga and on February 26 arrived at the detention station several miles from Bismarck, North Dakota, known as Fort Lincoln [R. 33]. On March 23, 1942, while interned at Fort Lincoln, he was served with a warrant of arrest issued by immigration authorities, and was on the same day summoned to appear before an immigration inspector sitting in Fort Lincoln [Tr. cover sheet]. The hearing opened with the appointment of an interpreter because of petitioner's limited knowledge of English, followed by this colloquy:

> "Q. There is presented for your inspection a formal warrant of arrest No. 56095/851 issued at Philadelphia, Pennsylvania by the chief of the Warrant Branch of this Service wherein it is charged that one Sannosuke Madokoro who entered this country at Calexico, California December 28, 1926, has been found unlawfully in the United States and subject to deportation therefrom under the following provisions of law:
>
> The Immigration Act of 1924 in that, at the time of entry he was not in possession of an unexpired immigration visa, and that he is an alien ineligible to citizenship and not excepted by Section 13(c) thereof.
>
> Q. Do you understand the nature of these charges? A. Yes.
>
> Q. Do you have a copy of this warrant of arrest? A. Yes.
>
> Q. A hearing will be granted for the purpose of affording you an opportunity to show cause, if there be any, why you should not be deported from the United States under the charges stated in this warrant of arrest. Do you understand? A. Yes.
>
> Q. At this hearing you have the right to be represented by counsel, either an attorney or other per-

son of good moral character, of your own selection and at your own expense, do you wish to be so represented? A. No.

Q. Are you ready and willing to proceed with your hearing at this time? A. Yes." [Tr. 1.]

The presiding inspector forthwith commenced to question petitioner [Tr. 1] and made no further mention of counsel in the course of the proceedings.

During the proceedings, when questioned about his finances, petitioner testified that he only possessed a few dollars [Tr. 10]; and on the hearing of his petition for a writ of habeas corpus he testified, without contradiction, that he had not had financial means to engage counsel and that in any event he had not known of any attorney available to him [R. 35]. It is to be judicially noticed that petitioner's normal community life and ties had been disrupted by the program of evacuation and internment of persons of Japanese ancestry and that a state of intense antagonism, hostility and suspicion towards such persons prevailed on the West Coast.[4]

The proceedings recite that findings were served upon petitioner on April 6, 1942 and that no exceptions were filed thereto [Tr. cover sheet].[5] On August 18, 1942, a warrant directing petitioner's deportation was issued [R. 3-4].

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[4]See *Hirabayashi v. United States*, 320 U. S. 81, 93, where the antagonism existing even before the war was judicially noticed; see opinion of District Court [R. 12, 14].

[5]On or about April 8 a letter was written by a fellow-internee, because of petitioner's inability to write English, at petitioner's dictation to the Commissioner of Immigration stating that his deportation would be a hardship [R. 46-48], but setting forth no other defense to the deportation order.

Statutes, Regulations and Constitutional Provisions Involved.

The order of deportation was issued under Section 14 of the Immigration Act of May 24, 1924, 8 U. S. C. 214, which provides:

> Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States * * * shall be taken into custody and deported * * *.

The immigration authorities' conclusion that petitioner was deportable under Section 14 was based on the view that he made an "entry" when he returned to the United States from Mexico on December 28, 1926, after an absence of a few hours, and that he was not entitled then to enter under Section 13(c) of the Immigration Act of May 26, 1924, 8 U. S. C. 213(c). Section 13 provides:

> (a) Persons not to be admitted. No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a nonquota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified in the visa in the immigration visa as such; and (5) is otherwise admissible under the immigration laws.
>
> (b) Readmission of legally admitted aliens who have temporarily departed without visas. In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the

United States without being required to obtain an immigration visa.

(c) Aliens ineligible to citizenship. No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant under the provisions of subdivision (b), (d), or (e) of section 4 of this Act, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, (3) is not an immigrant as defined in Section 3 of this Act.[6]

In support of the legality of his admission by the Customs officials in 1926, petitioner relies upon Section 3 of the Immigration Act of February 5, 1917, 39 Stat. 834 (section 136(p) of Title 8 of the United States Code). This section originally provided that

> "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor and under such conditions as he may prescribe,"

and the Attorney General has now been substituted for the Secretary of Labor.

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[6]Subdivision (b) of Section 4 provides that an immigrant who was previously lawfully admitted to the United States and is returning from a temporary visit abroad shall be deemed a nonquota immigrant and subdivisions (d) and (e) provide for such status for professors, ministers, students, and their families. Section 3 defines as an immigrant anyone departing for the United States from a foreign country except government officials and other persons entering this country temporarily for various specified purposes.

Pursuant to this section, Rule 12, Subdivision A of the Immigration Rules of 1925 was adopted and was in effect at the time of petitioner's admission. It read:

> "Paragraph 1. Under the seventh proviso to Section 3 of the Act of February 5, 1917, aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted, in the discretion of the Secretary of Labor, and under such conditions as he may prescribe. In such case satisfactory proof of domicile in the United States for seven consecutive years, and of departure therefrom with the intention of returning thereto, will be exacted. Every case of exclusion for any cause in which the alien has given such proof, shall be promptly brought by the immigration official in charge to the attention of the Secretary of Labor, through the usual official channels, with a complete report of the reasons for the alien's exclusion and of the proof which has been offered of continuous and unrelinquished domicile, together with a statement of the duration of absence.
>
> "Par. 2. Domicile, for the purpose of this subdivision, means that place where a person has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

In its interpretation of this Rule, the Circuit Court relied in part on Rule 3, subdivision F, paragraph 1 of the Immigration Rules of 1925, which rule was issued to implement section 13(b) of the 1924 Act (quoted *supra*). Rule 3 reads in relevant part:

> "No immigrant, whether a quota immigrant or non-quota immigrant, of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration official, at the

port of arrival, an immigration visa duly issued and authenticated by an American consular officer: Provided, That (a) aliens who have been previously lawfully admitted to the United States and who are returning from a temporary visit of not more than six months to Canada * * * Mexico * * * or such aliens who are returning from a temporary visit to any other foreign country and who are in possession of a permit to reenter the United States issued in accordance with the provisions of section 10 of the immigration act of 1924, * * * if otherwise admissible, shall be permitted to enter the United States without an immigration visa."

* * * * * * * *

The Fifth Amendment to the Constitution of the United States provides, so far as relevant to this case:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law."

Opinions of the Courts Below.

THE DISTRICT COURT.

The District Court discharged the writ of habeas corpus it had theretofore issued, dismissed the petition for the writ, and remanded petitioner to the custody of the immigration officials [R. 18]. In its supporting opinion, the Court indicated, as to the right to counsel, that it believed petitioner had intelligently waived the aid of counsel and that petitioner's internment in the enemy alien camp at the time of his deportation hearing could not be deemed to have deprived him of a fair hearing in view of the fact that deportation hearings conducted in prisons had been held to be fair ones [R. 12, 14]. It also stated that the admitted facts rendered petitioner deportable and that a

new hearing before the immigration authorities would therefore be of no real advantage to him [R. 14].

As to petitioner's deportability the Court only pointed out that an "entry" within the meaning of the Immigration laws includes an admission of an alien to this country subsequent to his original admission regardless of the duration of his absence, and that the fact that petitioner was no longer deportable on the basis of the illegality of his original entry did not convert his original entry into a lawful one [R. 13-14].

THE CIRCUIT COURT.

The Circuit Court held that petitioner was deportable under section 14 of the 1924 Act on the basis that he was not entitled to enter the United States at the time of his last admission on December 26, 1926. The latter conclusion rested on its construction of section 13(c) of the 1924 Act prohibiting the admission of an alien ineligible for citizenship except under certain conditions which petitioner did not satisfy; the Court held that section 13 repealed section 3 of the 1917 Act, under which petitioner was admissible, at least in so far as section 3 applied to aliens ineligible for citizenship [R. 78]. As to Rule 12 of the 1925 Immigration Rules, which was adopted pursuant to section 3 of the 1917 Act and under the terms of which petitioner likewise was admissible, the Court held, on the basis of the assumed connection between Rule 12 and Rule 3 of such Rules that only aliens "otherwise admissible" under the Immigration laws were intended to be admissible under Rule 12 [R. 78]. Under the Court's construction of such laws, this category did not include petitioner.

As to the right to counsel, the Circuit Court's holding was, in essence, that the facts as to petitioner's inability to secure counsel and the failure to assign counsel at the deportation hearing, could not be deemed to constitute a denial of due process, because all the facts there elicited from petitioner are admitted to be true [R. 79].[7]

Reasons for Granting the Writ.

I. The Circuit Court's holding as to the right to counsel is a serious limitation on the content of this right and is inconsistent with the principles of this Court's decisions. For the Circuit Court ignored the principle indicated in a number of this Court's opinions that a showing of specific prejudice resulting from the lack of representation by counsel is not necessary in order to establish a denial of due process. The Circuit Court likewise ignored the variety of valuable services performed by counsel other than the presentation and refutation of facts. Finally, the Circuit Court failed to consider the special elements in this case establishing petitioner's need for counsel which, under the decisions of this Court, lead to the conclusion

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[7]The Court does not in terms hold that there was or was not a denial of due process; the language of the opinion is that the Court deems it unnecessary to decide whether there was a denial of due process on the basis of the failure to assign counsel, since the failure to assign counsel was not in any event prejudicial because the facts elicited at the deportation hearings are admitted. However, the ruling that the failure to assign counsel was not prejudicial error requiring invalidation of the deportation order, is necessarily a holding that due process was not denied, since the Court recognizes that the order could be upheld only if due process were accorded. Thus, since the issue before the Court and the issue which it necessarily decided was whether or not due process was denied, the summarization in the text of the holding seems to be a correct statement of it and one which facilitates an appraisal of it in the light of the pertinent decisions.

that the failure to assign counsel to petitioner was a deprivation of due process.

Thus, this Court's grant of the instant petition is urgent in order to correct important errors by the Circuit Court with respect to the fundamental right to counsel and in order to delineate in further detail, and insure the effectuation of, this Court's doctrine with respect to the assignment of counsel.

II. The construction of section 3 of the Act of 1917 in the light of section 13 of the Act of 1924 poses an important question in the administration of the immigration laws upon which this Court has not yet passed. The Circuit Court's construction of these sections has very significant and damaging consequences, at the least, for all the aliens in this country who are ineligible for citizenship and whose original entry was unlawful. And these consequences follow despite the expiration of the period in which the alien could be deported because of the nature of his original entry and regardless of the length of time since such entry. For under this construction all such aliens who have been re-admitted to this country since the passage of the 1924 Act are now subject to deportation, despite the fact that their re-admission was approved by immigration authorities in reliance on the 1917 Act, and despite residence of as much as twenty years since such re-admission and in reliance upon it. Furthermore, none of such aliens may exercise the privilege of border-crossing, despite their years of residence in this country and despite the legitimacy, urgency and brevity of their business across the border.

The significance of the Circuit Court's ruling is greatly augmented by the fact that its damaging consequences affect only one racial group and that the construction thus

establishes a racial discrimination. For eligibility to citizenship depends upon race, and under the Circuit Court's construction aliens of the Japanese race are deportable and are unable to engage in border-crossing whereas aliens who are precisely similarly situated except for race are not subject to these liabilities and deprivations. Thus, in view of this Court's awareness of the evil of any extension of racial discrimination, its review of the instant case is important.[8] As will be shown more fully below, the Circuit Court's construction is erroneous because it does not give effect to the true Congressional intent either of section 13 of the 1924 Act or section 3 of the 1917 Act.

III. This case should be considered as a companion case to *Delgadillo v. Del Guercio,* No. 1244, October Term, 1946, wherein this Court granted certiorari on June 2, 1947. The instant case presents to this Court a set of facts carrying one step further the problem of just what state of mind an alien must have in order that he be considered to have made a new entry each time he returns to his home in this country from a contiguous country to which he went for a few hours during the usual course of his business.

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[8]And if the Circuit Court's view of the effect of Section 13 of the 1924 Act upon Section 3 of the 1917 Act is pursued to the conclusion that Section 3 is repealed with respect to all aliens by Section 13, the result would not involve racial discrimination but it would involve liability to deportation on the part of aliens of all races who are similarly situated to the petitioner. Thus the significance of the Circuit Court's decision, while reduced from one aspect, would be increased from the aspect of the number of aliens affected.

I.

Petitioner Was Denied Due Process of Law in the Deportation Proceeding in Violation of the Fifth Amendment to the Constitution of the United States.

It is clear that a deportation order deprives its subject of such important and fundamental rights that those procedural safeguards generally deemed a part of due process of law must be observed in a deportation proceeding. For, as this Court has stated:

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."
>
> *Bridges v. Wixon*, 326 U. S. 135, 154.

See also *Fiswick v. United States*,[9] 91 L. Ed. (Adv. Op.) 183, No. 51, Oct. Term, 1946.

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[9]In the *Fiswick* case, this Court said:

> "Although deportation is not technically a criminal punishment, it may visit great hardship on the alien. *Bridges v. Wixon*, 326 U. S. 135, 147. As stated by the Court, speaking through Mr. Justice Brandeis in *Ng Fung Ho v. White*, 259 U. S. 276, 284, deportation may result in the loss 'of all that makes life worth living.'"

And see *Ex parte Chin Loy You*, 223 Fed. 833, 838 (D. Mass., 1915), cited with approval by this Court in *Powell v. Alabama*, 287 U. S. 45, in which the Court, holding that the right to counsel must be accorded in a deportation proceeding, pointed out that "to make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceeding be called 'criminal' or 'civil' seems to me unsound."

While the Circuit Court did not attempt to deny the general premise that a party to a deportation proceeding must be granted the opportunity to appear by counsel, it held that petitioner's lack of representation could not constitute a denial of due process because the facts elicited at the deportation hearing were admitted to be true and he could not therefore be deemed prejudiced by such lack. It is clear at the outset that the Circuit Court's approach to the question of a denial of the constitutional right to counsel is contrary to that adopted by this Court. For "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States,* 315 U. S. 60, 76. See also *Williams v. Kaiser,* 323 U. S. 471, especially page 479, note 7; *Tomkins v. Missouri,* 323 U. S. 485, 489. But even if the prejudice resulting from lack of representation were to be calculated in a detailed fashion, the Circuit Court's narrow concept of the function and value of counsel is contrary to the decisions of this Court and to any realistic appraisal of the question.[10]

The variety and importance of the services performed by counsel other than the presentation or refutation of facts have been indicated in this Court's decisions. The

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[10]*Davis v. Texas,* 139 U. S. 651, cited by the Circuit Court, seems to have little bearing on the point at issue. There it was held that a trial judge's refusal to charge that the jury might find a crime of a lesser degree than murder did not prejudice the defendant because it would have been impossible for the jury to find that such lesser crime had been committed. This analogy is inapplicable to the case at bar not only because of this Court's doctrine that no specific prejudice from a denial of the right to counsel must be shown, but also because of the specific benefits, to be discussed below, which petitioner might have derived from representation.

value of counsel where the case turns on questions of law, unconcerned with conflicting facts, was particularly remarked by this Court in *Rice v. Olson,* 324 U. S. 786, 789. There this Court said:

> "The petitioner's need for legal counsel in this case is strikingly emphasized by the allegation in his habeas corpus petition that the offense for which the state court convicted him was committed on a government Indian Reservation 'without and beyond the jurisdiction of the Court.' This raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill."

The importance of counsel in the handling of other non-factual questions has also been noted: —for example, the question of the consequence of the plea of guilty (*Williams v. Kaiser,* 323 U. S. 471, 475; *DeMeerleer v. Michigan,* No. 140, October Term, 1946, 91 L. Ed. (Adv. Op.) 471); of the meaning of the charge (*Tomkins v. Missouri,* 323 U. S. 485, 488-89); and of methods for obtaining a new trial or taking an appeal (*Johnson v. Zerbst,* 304 U. S. 458). And this Court has referred to the value of counsel as a general protection against the dangers of "overzealous prosecution, of the law's complexity, or of his (the defendant's) own ignorance or bewilderment." (*Williams v. Kaiser,* at p. 476.)

In the instant case we need not rely on abstractions or generalities as to the aid petitioner could have derived from counsel. In the first place, petitioner's defense rests upon a complicated question of statutory construction (see Point II of this Brief), which was not raised before

the immigration authorities, which petitioner obviously was incapable of presenting for himself, and which might well have have been raised by counsel. Representation by counsel would have enabled petitioner not only to present the issue initially to the presiding inspector, but also to have availed himself of his right to file exceptions and to appeal to the Board of Immigration Appeals;[11] these rights are obviously chimerical in such a case as the instant one without the aid of counsel.[12] If the question of construction had been raised before the immigration authorities and had been determined in petitioner's favor, no order of deportation would have issued. Even if the question had been decided against him and judicial review of the order sought, petitioner's attack on the order in the courts would have been facilitated by the development

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[11]The Immigration Regulations provide that after the Presiding Inspector issues his findings of fact, conclusions of law and order, the alien has the right to file exceptions thereto, with a supporting brief (Sec. 150.7(a) (d) (e), 8 C.F.R. 2718); if he files such exceptions he has a right to oral argument before the Board of Immigration Appeals (Sec. 90.5, 8 C.F.R. 2674). If there is a dissent by a member of the Board to the majority decision, or if the Board certifies that there is a question of difficulty, the case is referred to the Attorney General for his opinion (Sec. 90.12, 8 C.F.R. 2676).

It is also to be observed that the Regulations afford the alien certain protections with respect to the conduct of the hearing; and his right to such protections is jeopardized by the lack of counsel. In the instant case, for example, petitioner was deprived of several such protections, and obviously was unaware of his rights to them under the Regulations (as to these rights see *infra*, note 13, and accompanying text).

[12]See *Roux v. Commissioner of Immigration at Port of San Francisco*, 203 Fed. 413, 417 (C. C. A. 9, 1913), where the Court held that the alien's lack of representation in a deportation proceeding was particularly damaging because the alien was unable, without an attorney, to appeal from an adverse decision of the Presiding Inspector to the Secretary of Labor and to argue his case before the latter.

of the issue before the immigration authorities and by their consideration of it with the possible issuance of an opinion. In actuality, in the absence of counsel, most of petitioner's testimony consisted merely of "yes" and "no" answers to the inspector's questions; he engaged in no defense to the charge against him and no argument as to the lawfulness of his deportation was made by him or on his behalf. The record of the proceedings state that findings were served upon the petitioner on April 6, 1942 [Tr., cover sheet] although no copy of the findings appears in the record; no exceptions were filed to the findings, and no argument held thereon either orally or by way of brief before the Board of Immigration Appeals or otherwise.

The fact that the officer in charge of the hearing was also, in a sense, the prosecutor, and that, irrespective of labels, he made little, if any, attempt to aid petitioner defend himself and, in particular, to understand the questions of law involved, increased petitioner's need for counsel. Thus, for example, the followng colloquy took place:

> "Q. In addition to the charges stated in the warrant of arrest it is further charged that you are unlawfully in the United States and subject to deportation therefrom under the following provisions of law:
>
> The Immigration Act of 1917 in that you admit the commission, prior to entry into the United States, or a felony or other crime or misdemeanor involving moral turpitude, to wit: perjury.
>
> Do you understand? A. Yes.
>
> Q. Have you any evidence to offer or statement to make to show cause why you should not be deported from the United States under the charges

stated in the warrant of arrest and the additional charge lodged at this hearing? A. I have nothing to say." [Tr. 7.]

It seems apparent that petitioner could not, without the aid of counsel, fully comprehend such statements as these; and it is to be noted that both in this colloquy, and in reciting the original charge to petitioner at the commencement of the hearing without an explanation of it [Tr. 1], the Inspector did not comply with the applicable Immigration Regulations. For the Regulations reflect an appreciation of the fact that the mere recitation of the charge to the alien will not sufficiently inform him of its nature; they provide that the presiding inspector is to inform the alien of the charges "by repeating them verbatim *and* explaining them in language which will clearly convey to the alien the nature of the charges he must answer." (Sec. 150.6(c) 8 C. F. R. 2716.)[13]

It is thus clear that petitioner's need for counsel was not dissipated by the circumstance that the facts elicited in the deportation hearing are admitted, and that this circumstances does not, as the Circuit Court held, establish that petitioner did not require counsel. And we believe that the other circumstances of the case, when considered in conjunction with the concrete and important respects in which counsel could have aided petitioner, affirmatively establish that petitioner was denied due pro-

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[13]The influence of the presiding inspector on the proceedings, and the need for some protection to the alien with respect to the person assuming this role, is reflected in the Regulation providing that the inspector who conducted the investigation in the case shall not act as presiding inspector unless the alien consents thereto (Sec. 150.6(b), 8 C.F.R. 2715). There is no indication in the instant proceeding as to whether or not this Rule was observed in petitioner's case.

cess of law in that counsel was not assigned to represent him. The relevant circumstances will now be summarized.

The proceeding for petitioner's deportation was conducted shortly after the declaration of war on Japan and shortly after the initiation of the program of evacuation and internment of residents of the Japanese race on the West Coast, when sentiment against all such Japanese was at its height. Petitioner, at the time of the deportation hearing, had been removed from his home to a detention center along with other Japanese aliens. He had lived in Guadalupe, Santa Maria, California, where he was first apprehended as an enemy alien on February 18, 1942. [R. 33.] He was then sent to a detention station at Tujunga, California, and from there to Fort Lincoln in North Dakota where he arrived on February 26, 1942, and was there delivered by Immigration authorities to Army authorities on March 10, 1942 [R. 33]. On March 23, 1942, while at Fort Lincoln in the custody of military authorities, petitioner was summoned to appear before an immigration inspector [Tr., cover sheet, 1]. The inspector determined that petitioner had a limited command of English, appointed an interpreter and proceeded to present and read to him the warrant of arrest stating that petitioner was "subject to deportation * * * under * * * the Immigration Act of 1924 in that, at the time of entry he was not in possession of an unexpired immigration visa, and that he is an alien ineligible to citizenship and not excepted by Section 13(c) thereof." [Tr. 1.] The inspector then recited that a hearing would

be granted to afford petitioner an opportunity to show cause why he should not be deported; this statement was succeeded by the following recitations and replies:

> "Q. At this hearing you have the right to be represented by counsel, either an attorney or other person of good moral character of your own selection and at your own expense, do you wish to be so represented. A. No.
>
> Q. Are you ready and willing to proceed with your hearing at this time? A. Yes." [Tr. 1.]

The inspector forthwith proceeded to administer the oath, and to conduct the hearing [Tr. 1]. No other offer or mention of counsel was made throughout the proceeding.

The Circuit Court indicated its assumption [R. 79], and the record showed, that petitioner was not able to obtain counsel. This inability arose not only because petitioner was practically penniless as a result of his evacuation and internment,[14] but also because of other circumstances connected with the emergency situation. For petitioner's normal community life and ties had been shattered by the evacuation program, and the prevailing antagonism and hostility toward residents of the Japanese

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[14]Petitioner's uncontradicted testimony in the deportation hearing was that he then possessed only three or four dollars [Tr. 10] and he testified in the District Court that at the time of the deportation hearing he had had no money to engage an attorney and that he knew of no attorney available to represent him [R. 35]. Thus the argument advanced by the immigration authorities in their brief in the Circuit Court that the detention center was only four miles from the city of Bismarck, which had a population of over 15,000, so that "doubtless there were attorneys there available within * * * (petitioner's) financial means," has no support in the evidence.

race had caused their spiritual as well as physical isolation from the Caucasian community.

These facts, we believe, together with those as to petitioner's personal background, reveal the urgency of his need for counsel. Petitioner was not an "intelligent and educated"[15] layman who might have had some capacity to represent himself in this proceeding. Rather, he was a person of no education, or at least none in the United States, a laborer and a farm worker. And the fact that an interpreter was used because of petitioner's limited knowledge of English in itself placed petitioner at a further disadvantage and increased his need for counsel. A reading of the transcript cannot but engender doubt as to whether petitioner comprehended many of the questions and as to whether his answers were accurately reported; petitioner's interests in the absence of counsel depended to a large extent upon the good will of the interpreter.

Finally, whatever ability petitioner might have possessed under ordinary circumstances to aid himself without counsel was greatly diminshed by his situation prior to and at the time of the deportation proceeding. The threatening and forbidding impression created by the use of military guard at petitioner's place of detention, the fact that the detention was for an undetermined and indefinite period, and the fact that the Caucasian majority showed antagonism toward residents of the Japanese race of so extreme a nature as to result in acts of violence, all necessarily tended to engender in petitioner a state of mind of confusion and hopelessness with respect to the deportation proceeding. For petitioner's right to live and

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[15] *Powell v. Alabama,* 287 U. S. 45, 69.

work peacefully in the United States must have seemed to him considerably imperiled, if not completely destroyed, regardless of the outcome of the deportation proceeding, and his status as a resident highly precarious. Accordingly petitioner was not in a position even to appreciate that success in the deportation proceeding would be of any real moment to him, and thus he was indubitably under a grave disability with respect to making an objective or accurate appraisal of the possibility or value of defending himself therein. Further, any exercise of initiative by petitioner, such as a request for time to consider the problem of counsel or to secure counsel, would necessarily have been discouraged by the summary manner of his arrest and internment as an alien enemy shortly before the deportation proceeding and the consequent diminution of any belief he might have had as to his rights in a Governmental proceeding against him.

We believe that this "totality of facts"[16] shows petitioner's acute need for counsel in order to insure the true implementation of his right to be heard; and we believe that petitioner was denied due process of law in that this need was not satisfied and he was forced to appear in the proceedings without counsel. While the penalty here involved is not as extreme as that in the *Powell* case, the other circumstances of this case are highly similar to those there involved. In that case this Court noted:

> "* * * the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states

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[16] *Betts v. Brady*, 316 U. S. 455, 462.

> and communication with them necessarily difficult and above all that they stood in deadly peril of their lives"—

and stated, on the basis of these facts:

> "* * * assuming their inability, even if opportunity had been given, to employ counsel as the trial court evidently did assume, we are of the opinion that under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." (*Powell v. Alabama,* 287 U. S. 45, 71.)

As this Court has recognized (see *supra,* p. 15), it is impossible to view deportation as of less serious consequences to its subject than even a severe criminal penalty. We believe that under this Court's decisions, all the facts as to the nature of the proceedings, as to petitioner's background, and as to his situation at the time of the hearing must be considered; and that in view of these facts petitioner's need for counsel was sufficiently urgent and the consequences of his lack of representation are sufficiently grave so that the failure to assign counsel was a deprivation of due process of law. See *Williams v. Kaiser,* 323 U. S. 471; *Tomkins v. Missouri,* 323 U. S. 485; *White v. Ragen,* 324 U. S. 760; *Rice v. Olson,* 324 U. S. 786; *Canizio v. New York,* 327 U. S. 82, 85.

It seems clear that petitioner cannot be deemed to have waived the right to have counsel appointed to represent him. While he answered in the affirmative when asked if he were ready and willing to proceed, there was at no time any indication of the possibility of any help in obtaining counsel. There was thus no "intentional relinquishment or abandonment of a known right or privilege"

with respect to the right to have counsel assigned (*Johnson v. Zerbst*, 304 U. S. 458, 464).[17]

* * * * * * * * *

Even if, however, it were concluded that due process did not require the assignment of counsel to petitioner, petitioner was nevertheless denied due process in that he was not given an adequate opportunity to apprise whether or not he should attempt to secure counsel nor an adequate opportunity to make such an attempt.

As pointed out above, the proceeding commenced with a recitation and presentation of the warrant, which, for all that appears, had not been presented to petitioner prior to that time, and had, at the most, been presented immediately before the commencement of the hearing; and this recitation was followed by the recitation as to counsel. There was no further explanation of the seriousness of the proceedings or of the function of counsel and no indication of any sort that petitioner would have been allowed time to secure representation. The inadequacy of this offer of counsel is indicated by the Immigration Regulations themselves. For the Regulations provide that the alien, immediately upon being taken into custody, is to be advised of his right to representation by counsel and of the amount of bail under which he may be released from custody and that he is to be "given a reasonable time to arrange for his defense, including, if desired, representation by counsel" (Section 150.4, 150.6(a), 8 C. F. R.

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[17]And the right to assignment of counsel is not conditional upon a request for assignment (*Tomkins v. Missouri, supra; Rice v. Olson, supra; Canizio v. New York, supra,* at p. 85).

The Regulations permt of, and might even be construed to require in an appropriate case, the assignment of counsel. They provide that the presiding inspector is to "apprise the alien, if not represented by counsel, that he may be so represented if he desires" (Sec. 150.6(c), 8 C.F.R. 2717).

2714, 2715); the Regulations also make provision for continuances in order to secure counsel (Sec. 150.6(c), 8 C. F. R. 2717). Compliance with these provisions would obviously afford the alien an opportunity to appraise the value of counsel and to secure counsel to an extent not allowed in the instant proceedings.[18] An offer of counsel of a more meaningful and less perfunctory nature than that here made was essential in petitioner's case not only because he was an uneducated and illiterate person, but, more important, because of his incapacity to evaluate the significance of the proceedings as a whole, and the possibility or value of defending himself therein, due to the factors in his situation before and at the time of the proceeding which have been noted above. Under these circumstances it cannot be concluded that when petitioner replied in the negative to the question as to counsel that he "knows [knew] what he is doing and his choice is [was] made with eyes open." *Adams v. United States ex rel. McCann,* 317 U. S. 269, 279. It cannot be held that there was an "intentional relinquishment or abandonment of a known right or privilege" when the content of the right to counsel was so little known and appreciated and so little opportunity for a deliberate choice and an "intelligent

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[18]It is to be observed that even if due process does not require the specific safeguards furnished by the Regulations, non-compliance with them in important respects, such as occurred in the instant case, is in itself a contravention of due process. See *Bridges v. Wixon,* 326 U. S. 135, 153; *U. S. ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 155; *Sibray v. United States,* 282 Fed. 795 (C. C. A. 3, 1922), where no opportunity was allowed for inspection of the warrant; *United States ex rel. Chin Fook Wah v. Dunton,* 288 Fed. 959 (S. D. N. Y., 1923) where the rule that the alien had a right to have a friend or relative present was disregarded; *Colyer v. Skeffington,* 265 Fed. 17 (D. Mass., 1920), reversed on other grounds, *Skeffington v. Katzeff,* 277 Fed. 129 (C. C. A. 1, 1922); *Roux v. Commissioner of Immigration at Port of San Francisco,* cited *supra,* note 12.

waiver" was afforded. *Johnson v. Zerbst,* 304 U. S. 458, 464. See also *Glasser v. United States,* 315 U. S. 60, 71; *Powell v. Alabama,* 287 U. S. 45; *Rice v. Olson,* 324 U. S. 786; *DeMeerleer v. Michigan,* 91 L. Ed. (Adv. Op.) 471, No. 140, Oct. Term, 1946.

On the whole record, the conclusion seems inescapable that the deportation proceeding was conducted in an essentially arbitrary and unfair manner, with no attempt to secure for petitioner the true value and benefit of his right to a hearing. The atmosphere of perfunctory disposition of an alien which characterized petitioner's hearing reflected the atmosphere of emergency attendant upon the general program of evacuation and internment of persons of the Japanese race. But whatever justification existed for the suspension of the ordinary liberties of residents of the Japanese race for security purposes, no justification existed for any less than a full observance of their rights when their permanent residence in this country was at stake in deportation proceedings wholly unrelated to that emergency.

Petitioner was deprived of due process of law in that an order seriously interfering with his liberty was issued against him on the basis of a proceeding in which he could not adequately defend himself without counsel but in which his need for counsel was not satisfied nor his right to counsel waived.[19] "In truth, though not in form" he was "refused the aid of counsel." *Palko v .Connecticut,* 302 U. S. 319, 327.

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[19]In the arguments in the courts below, immigration authorities referred to a letter stating petitioner's deportation would be a hardship, which was written by a fellow-internee to the Commissioner of Immigration at the petitioner's instance after the hearing, as a possible partial satisfaction of his right to counsel [R. 46-48, 62]. But it seems obvious that the fellow-internee's limited services as an amanuensis, solicited by petitioner because of his lack of knowledge of English, could not be seriously regarded in this light.

II.

The Circuit Court Erred in Determining That Petitioner Was Deportable Under Section 14 of the 1924 Act.

The Circuit Court's determination that petitioner was deportable rested upon its conclusion that section 3 of the 1917 Act was repealed, at least in so far as aliens ineligible for citizenship are concerned, by section 13 of the 1924 Act.

Petitioner concededly was admissible under section 3 of the 1917 Act which permitted the admission of "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." This section has been continued as section 136(p) of Title 8 of the United States Code; and the question is whether its effect was so modified by the adoption of section 13 of the 1924 Act as to prohibit petitioner's recrossing of the Mexican border when he did so in 1926.

At the outset it is to be observed that section 13 covers the admission of all aliens to the United States, and not only that of aliens ineligible for citizenship. That is, it prohibits the admission of both eligible and ineligible aliens unless they meet conditions specified for each group. There is no basis for differentiation between the prohibitions of section 13 as to the admission of eligible and as to the admission of ineligible aliens, for the purpose of determining the effect of section 13 upon section 3; accordingly, the Circuit Court's holding cannot be supported on the basis that section 3 was repealed by section 13 only in so far as aliens ineligible for citizenship are concerned but that section 3 was unaffected by section 13 in so far as other aliens are concerned.

Not only would this construction be completely unwarranted by the terms of the section and therefore entail an

arbitrary differentiation between the two groups of aliens, but it would, furthermore, result in an arbitrary discrimination against one racial group. For eligibility to citizenship is based on race, with aliens of the Japanese race the only substantial ethnic group barred from citizenship. (See Act of Sept. 22, 1922, 42 Stat. 1022, as amended, 8 U. S. C. 703.) If section 3 is considered affected by section 13 only in so far as aliens ineligible for citizenship are concerned, then Japanese aliens who have been re-admitted to the United States under section 3 are deportable, but all other aliens so re-admitted, though likewise barred from the United States under section 13, are not deportable. And Japanese aliens would not be entitled to the privilege of border-crossing though all aliens similarly situated except for race would be so entitled. But racial discrimination can be justified only by "pressing public necessity";[20] here the only circumstance which differentiates the two groups is eligibility for citizenship, and this distinction does not furnish a reasonable ground, and certainly not an urgent necessity, for the discrimination.

Further, the Circuit Court's construction must be deemed erroneous because of the fundamental rule of statutory construction that Congress is not to be presumed to have intended to repeal a statute, either in whole or in part, unless it makes this intent explicit or unless the statutory provisions are entirely irreconcilable with those of a later statute. This principle was recently stated in the following language:

> "That repeals by implication are not favored and that two statutes dealing with related subject mat-

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[20] *Korematsu v. United States*, 323 U. S. 214, 216.

ter should, if possible, be so construed as to give effect to both are principles of statutory construction too elementary to require the citation of authorities."

A. P. W. Paper Co. v. Federal Trade Commission, 149 F. (2d) 424, 427 (C. C. A. 2, 1945), affirmed *Federal Trade Commission v. A. P. W. Paper Company,* 66 S. C. 932, 328 U. S. 193. See *Commissioner of Immigration of Port of N. Y. v. Gottlieb, et al.,* 265 U. S. 310, 312, where this Court gave effect to this principle in construing section 3 of the Immigration Law of 1917 in the light of the Quota Law of 1921. In the instant case, there has been no express repealer of section 3; on the contrary, an affirmative Congressional intent to continue section 3 is shown by the facts that it was incorporated in the Code as section 136(p) of Title 8 of the United States Code, and that Congress did not change this subdivision of section 136 even when the section was under its purview by virtue of its amendment of another subdivision of the section. (See Act of March 4, 1929, c. 610, Sec. 1(d), 45 Stat. 1551, Sec. 136(r).)[21] Thus, it is clear that section 3 is to be given effect if it is in any way reconcilable with section 13; and we shall show below that it is so reconcilable on a reasonable basis which effectuates the intent of both sections.

While it is impossible to support the Circuit Court's holding on the basis of distinguishing between the pro-

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[21]Section 25 of the 1924 Act (8 U. S. C. 223), upon which the Circuit Court relied in part, does not seem significant for the determination of the proper construction of the sections here involved. Section 25 provides that "an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act." However, reference to Section 25 merely begs the question, since the problem here is whether the 1924 Act (by Section 13(c)) is or is not to be construed so as to exclude petitioner in view of the co-existence of Section 3 of the 1917 Act.

hibitions of section 13 with respect to their affect on section 3, it is equally impossible to support the holding on the basis that the section is to be deemed repealable by section 13 with respect both to eligible and ineligible aliens. For such a complete repealer, even less than a partial repealer, is not to be implied unless it is the unavoidable effect of the later statute.

The construction which will give effect to both sections 3 and 13 and thus avoid implying a repealer of section 3, and which does moreover conform to the Congressional intent of each section, is that which rendered petitioner admissible when he was permitted to re-cross the border into the United States in 1926. For the two sections can both be given effect by construing section 3 as referring to border-crossing and by construing section 13 as referring to immigration in its normal and customary sense of a departure for the United States from a foreign land by one who has never resided in the United States or by one who has so resided but has broken such residence. This interpretation of section 13 conforms to the general pattern of the immigration law. For section 13 appears in a subchapter entitled "quota and non-quota immigrants", and this section, along with all the provisions of the subchapter, relate to the control of increments in the resident alien population of the United States. Border-crossing is unrelated to this problem; for in border-crossing the trip in and out of the United States is in a sense one operation, and there is no break of even a temporary nature in the residence in the United States. The situation is well-illustrated by the instant case where the petitioner crossed for a few hours to work and then returned home in the evening to his abode in the United States.

That section 13 is to be construed as relating to true immigration rather than border-crossing is further indicated by the provision of section 13 as to admission after a temporary absence. For section 13, like section 3, has a provision for a return after a temporary departure, but specifies that such return is to be permitted only to an alien who was previously lawfully admitted. However, the departure to which section 13 refers has been construed as including departures for extended periods. While a regulation specified that a temporary departure under section 13 and its companion section 4 was to be limited to six months, this regulation was interpreted merely to mean that even an absence of more than six months only raised a presumption that the absence was for more than a temporary visit.[22] And admission has been considered permissible under the provisions of the 1924 Act after an absence of as long as ten years.[23] To limit re-admission after a prolonged absence to aliens whose original entry was lawful by applying section 13 in such cases, but to permit re-admission of aliens with established domiciles where there is no break in residence whether or not they were originally lawfully admitted, through application in these instances of section 3, reaches a reasonable result. For in the latter cases, the alien, whatever the method of his original entry, has a

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[22]*Lidonnici v. Davis*, 16 F. (2d) 532 (App. D. C., 1926), cert. den. 274 U. S. 744; *Transatlantica Italiana v. Elting*, 66 F. (2d) 542 (C. C. A. 2, 1933); *Compagnie Francaise de Navigation A. Vapeur v. Elting*, 66 F. (2d) 536 (C. C. A. 2, 1933), cert. den. 290 U. S. 693.

[23]*Serpico v. Trudell*, 46 F. (2d) 669 (D. Vt., 1928). And see *United States ex rel. Alther v. McCandless*, 46 F. (2d) 288 (C. C. A. 3, 1931).

long-continued residence, which he has made no move to interrupt.

Finally, it is to be observed that the distinction between border-crossing without a break in residence, and a true departure and re-entry as an immigrant has been generally recognized, and the recognition is evidenced in the phraseology of regulations and statutes. See for example section 451, title 8, United States Code, which provides for the exclusion of aliens who do not present "a visa * * *, a re-entry permit, or a border-crossing identification card."

By construing section 3 to permit temporary absences by virtue of border-crossing, where there is no break in residence, by aliens with an unrelinquished domicile of seven years whether or not originally lawfully admitted, and section 13 as applying to re-entry where there is a break in the residence, a reasonable effect can be given to both sections.[24]

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[24] The Circuit Court's reconciliation of the various provisions of the Immigration Regulations of 1925, in effect at time of petitioner's admission, follows its construction of the statute and is equally erroneous. Rule 12, subdivision A of the Immigration Rules of July 1, 1925, was issued under Section 3 of the 1917 Act and provided, like that section, for the admission of aliens returning after a temporary absence to an unrelinquished domicile of over seven consecutive years. The Court deemed this Rule to be affected by Rule 3 which was issued pursuant to Section 13(b), and provided for the admission without an immigration visa of aliens who had previously been lawfully admitted, who were returning from a visit of not more than six months, and who were "otherwise admissible" under the Immigration laws. The Circuit Court reasoned that the "otherwise admissible" phrase of Rule 3 was to be considered to limit admissibility under Rule 12 as well; and since it construed Section 13(c) of the 1924 Act as barring the petitioner, he was, under this reasoning not admissible under Rule 12. Since the Court's reasoning falls if its construction of Section 13(c) of the 1924 Act is rejected, we need not labor the point that there is no warrant, in any event, for transposing a phrase from Rule 3 to Rule 12 since the Rules were promulgated pursuant to separate statutory provisions and with no indication of common purpose.

Conclusion.

It is respectfully requested that this petition to the United States Circuit Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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NANNETTE DEMBITZ,
Attorneys for Petitioner.

FRED OKRAND,
Of Counsel.

INDEX

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 164

SUMIO MADOKORO, IN BEHALF OF SANNOSUKE MADOKORO, AND SANNOSUKE MADOKORO, PETITIONERS

v.

ALBERT DEL GUERCIO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, LOS ANGELES, CALIFORNIA, DISTRICT NO. 16

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 11–15) is not reported. The opinion of the circuit court of appeals (R. 74–80) is reported at 160 F. 2d 164.

JURISDICTION

The judgment of the circuit court of appeals was entered February 27, 1947 (R. 80–81), and

a petition for rehearing was denied April 4, 1947 (R. 81). The petition for a writ of certiorari was filed June 30, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Japanese alien returning after a temporary absence to an unrelinquished United States domicile of more than seven consecutive years may be admitted under the seventh proviso to Section 3 of the Immigration Act of 1917, even though (1) he does not have an unexpired visa as required by Section 13 (a) of the Immigration Act of 1924, and (2) he is barred by Section 13 (c) of the 1924 Act by reason of his being an alien ineligible to citizenship and not excepted by that provision.

2. Whether petitioner was denied due process of law in not being furnished with counsel at his deportation hearing, where he indicated through an interpreter (whom he said he had thoroughly understood) that he did not desire to be represented by an attorney or other person.

STATUTES, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The various provisions of the immigration statutes, executive orders and regulations involved are set out in the Appendix, *infra*, pp. 19–26.

STATEMENT

The present proceeding arises on a petition for a writ of habeas corpus (R. 2–6) challenging the validity of an order and warrant for petitioner's deportation.

Petitioner Sannosuke Madokoro, herein referred to simply as petitioner, a native and citizen of Japan (R. 3, Tr. 18–19),[1] first entered the United States at Seattle, Washington, on August 21, 1915, as a member of the crew of the *Tacoma Maru,* which he deserted on August 22, 1915 (Tr. 20 and accompanying Exhibit 2). Except as noted below, petitioner has resided in this country continuously since that time (Tr. 20). Between 1918 and 1926, petitioner made numerous trips between the United States and Mexico for the purpose of managing a ranch in the latter country (R. 44–45, Tr. 20–21). His last such trip was made on December 28, 1926, when he want to Mexicali, Mexico, for half a day and returned to the United States at Calexico, California (R. 13, Tr. 23).

[1] The designation "R" refers to the printed transcript of record. "Tr." refers to the transcript of the deportation hearing which, with the other pertinent deportation documents, was attached to the Return to the Writ of Habeas Corpus as Exhibit A. Exhibit A was, by stipulation (R. 70), not printed, but was considered in its original form by the court below and is presently lodged with the Clerk of this Court.

At that time petitioner had no visa or other valid entry papers.[2]

On February 18, 1942, petitioner was taken into custody as an enemy alien and ultimately interned in a detention station at Fort Lincoln, North Dakota (R. 33).[3] On March 18, 1942, while petitioner was interned at Fort Lincoln, a warrant directing his arrest was issued, charging that he last entered the United States on December 28, 1926, and that he was subject to deportation "in that at the time of his entry he was not in possession of an unexpired immigration visa; and in that he is an alien ineligible to citizenship and not exempted by Paragraph (c) Section 13 [of the Immigration Act of 1924]" (R. 75). Thereafter, on March 23, 1942, petitioner was accorded a hearing under the warrant.

At the opening of the hearing, which was conducted through an interpreter, petitioner indicated that he understood the nature of the charges, which were read to him at that time, that he understood that the purpose of the hearing was to afford him an opportunity to show

[2] At an earlier date, petitioner had been issued a so-called border-crossing identification card (Tr. 21 and accompanying Ex. 3), but the card admittedly had expired before the December 28, 1926, entry (Tr. 23). Moreover, petitioner conceded that the card was obtained fraudulently (Tr. 22–23). As will be pointed out below, fn. 10, p. 10, and text, such a card could not be issued to aliens who had entered the United States illegally.

[3] Fort Lincoln is about four miles from Bismarck, North Dakota.

cause why he should not be deported, that he did not desire to be represented by counsel either professional or lay, and that he was ready and willing to proceed with the hearing at that time.' At the close of the hearing, petitioner acknowl-

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' "Presiding Inspector to Respondent:

"Q. Are you able to speak and understand the English language?—A. Not much.

"Q. Do you understand the Japanese language as spoken by Mr. Kimm?—A. Yes.

"Q. There is presented for your inspection a formal warrant of arrest No. 56095/851 issued at Philadelphia, Pennsylvania, by the chief of the Warrant Branch of this Service wherein it is charged that one Sannosuke Madokoro who entered this country at Calexico, California, December 28, 1926, has been found unlawfully in the United States and subject to deportation therefrom under the following provisions of law:

" 'The Immigration Act of 1924 in that, at the time of entry he was not in possession of an unexpired immigration visa, and that he is an alien ineligible to citizenship and not excepted by Section 13 (c) thereof.'

"Q. Do you understand the nature of these charges?—A. Yes.

"Q. Do you have a copy of this warrant of arrest?—A. Yes.

"Q. A hearing will be granted for the purpose of affording you an opportunity to show cause, if there be any, why you should not be deported from the United States under the charges stated in this warrant of arrest. Do you understand?—A. Yes.

"Q. At this hearing you have the right to be represented by counsel, either an attorney or other person of good moral character, of your own selection and at your own expense, do you wish to be so represented?—A. No.

"Q. Are you ready and willing to proceed with your hearing at this time?—A. Yes.

edged that he had understood the official interpreter.[5]

Subsequent to the hearing, the presiding inspector's proposed findings, conclusions and order (Tr. 15–17) were served upon petitioner, who filed no formal exceptions thereto (Tr. 14).[6] After reviewing the case, the Board of Immigration Appeals concluded that petitioner was subject to deportation on the grounds recited in the warrant of arrest (see Acting Chairman's memorandum of August 18, 1942, Tr. 11–13),[7] and accordingly a warrant for his deportation to Japan, execution of which was "to be deferred until such time

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"Q. Raise your right hand and be sworn: Do you solemnly swear the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?—A. Yes." (Tr. 18.)

See Immigration Regulation 150.6, *infra*, pp. 25–26, for the requirements to assure that the alien is informed of his rights and of the purpose of the hearing.

[5] "Q. Have you thoroughly understood the interpreter during this hearing?—A. Yes." (Tr. 30.)

See also the second question and answer set out in footnote 4, *supra*.

[6] Under date of April 8, 1942, however, petitioner wrote to the Commissioner of Immigration and Naturalization protesting generally against the inspector's conclusions, and asking that he be permitted to stay in the United States (R. 46–48; Tr. 39–40).

[7] Under Immigration Regulations, review by the Board is automatic (see 8 C. F. R. 150.7–150.9). Cf. Pet. 18 asserting that "Representation by counsel would have enabled petitioner * * * to appeal to the Board of Immigration Appeals * * *."

as deportation becomes practicable," was issued (Tr. 10).

On December 21, 1945, a petition for a writ of habeas corpus was filed on petitioner's behalf in the District Court for the Southern District of California asserting as the sole ground for relief that his detention pursuant to the above-described deportation proceeding and warrant was illegal in that at the deportation hearing "petitioner did not have the opportunity to have the benefit of counsel, in violation of federal statutes and departmental regulations" (R. 2–6). After a return had been made (R. 6–8), a full hearing was had (R. 9–10, 23–65) at which petitioner testified (R. 10, 37–51), and was represented by counsel of his own choice (R. 9, 23). Thereafter, the district court discharged the writ and dismissed the petition (R. 17–18). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order was affirmed (R. 80–81).

ARGUMENT

The petition for a writ of certiorari challenges the deportation proceedings on two grounds: (1) that petitioner was not given a fair hearing in that under the circumstances counsel should have been assigned him (Pet. 12–13, 15–28), and (2) that he was not deportable because at the time of his return to the United States on December 28, 1926, he was admissible under the seventh

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proviso to Section 3 of the Immigration Act of 1917 as an alien with an unrelinquished United States domicile of seven consecutive years (Pet. 13–14, 29–34).

1. As we have already noted, *supra,* p. 7, the petition for a writ of habeas corpus raised only the question of denial of due process by reason of an alleged denial of the right to counsel. Moreover, at the habeas corpus hearing, petitioner's counsel, who also represents him here, stated repeatedly that this was the only issue involved (R. 24, 30, 46). Consequently, we do not believe that the circuit court of appeals should have considered petitioner's contention raised for the first time on appeal and now renewed here, that the deportation order was illegal because petitioner was admissible in 1926 under the seventh proviso to Section 3 of the 1917 Act. But, in any event, as the court below held (R. 75–78), it is clear that, as a matter of law, petitioner's substantive contention is without merit.

This appears clearly once the pertinent legislation is reviewed in its setting.

The Immigration Act of February 5, 1917, which is the foundation of our present immigration laws, embodied all the previous laws on immigration. The keystone of that statute is the series of desirability standards set out in Section 3[8] providing for the exclusion of such aliens as

[8] 39 Stat. 874, 8 U. S. C. 136.

are physically, mentally, morally, or politically undesirable. They cannot enter if they have a contagious disease, or if they cannot read or write, or if they are polygamists or have committed a crime involving moral turpitude, or if they are anarchists or desire by force to overthrow the government. However, the so-called "seventh proviso" to Section 3 (*infra*, p. 19) permits their admission in the discretion of the Secretary of Labor (now the Attorney General) under such conditions as he may prescribe, if the aliens are "returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." In exercising authority under the foregoing proviso, certain disqualifications created by the desirability standards of Section 3 can be waived. See Immigration Manual, § 584 at p. 5159. The 1917 Act did not provide any quota or visa system, but permitted free immigration, subject to conformance with the desirability standards and to other possible exclusion laws or treaties.

By 1924, Congress concluded that unlimited immigration to the United States was no longer desirable and that immigration should be limited both in terms of total numbers admitted and in relation to the national origins of the immigrants. See H. Rep. 350, 68th Cong., 1st sess. Accordingly, it enacted a new statute [9] denying admission

[9] Act of May 26, 1924, c. 190, 43 Stat. 153, 8 U. S. C. 201–231.

for permanent residence to Asiatics and limiting the admission of all others by means of a quota and visa system. So far as is pertinent here, the 1924 Act provided in Section 13 (*infra*, p. 20) that no immigrant was to be admitted unless he had an unexpired immigration visa (subsection (a)), except that certain aliens who had previously been *legally* admitted and had departed temporarily might be readmitted without a visa (subsection (b)),[10] and that no alien ineligible to citizenship should be admitted unless he came within certain specified but limited exceptions (subsection (c)) one of which, by cross-reference to Section 4 (b)[11], was essentially the same as the exception provided by 13 (b). Japanese aliens

[10] The visa requirement was reiterated by Executive Order No. 4476, of July 12, 1926 (*infra*, pp. 21–22), and by the Immigration Rules of July 1, 1925 (Rule 3, subdivision F, paragraph 1, *infra*, p. 22), both of which were in force at the time of petitioner's last entry. So far as is pertinent here, only two exceptions were thereby allowed, but neither applied unless the aliens had been previously *legally* admitted to the United States. The first exceptions covered temporary trips of less than six months to adjacent lands, such as Mexico and Canada, the readmission of aliens in this category to be effected by so-called border-crossing identification cards. See Rule 3, subdivision R, paragraph 1 of Immigration Rules of July 1, 1925 (*infra*, p. 23); cf. present rule 8 C. F. R. 110.54 (a). The second exception related to aliens temporarily traveling abroad other than as above, whose readmission was to be effected by the issuance of permits to reenter. See Rule 24, subdivision B, paragraph 1 of Immigration Rules of July 1, 1925 (*infra*, pp. 23–25); cf. present rule 8 C. F. R. 165.3.

were then, as now, ineligible for citizenship. See Nationality Code, 8 U. S. C. 703 and notes; see also H. Rep. 350, 68th Cong., 1st sess., pp. 4–10.

To assure that aliens seeking to qualify for admission would have to meet the requirements of both the 1924 and the 1917 acts, Congress inserted in the 1924 statute Section 25 (*infra,* p. 21), which, so far as is pertinent to the instant case, provides:

> The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws * * *. * * * an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

Thus it is clear that conformance to the requirements of both statutes is a prerequisite to admissibility. *United States* v. *Curran,* 9 F. 2d 900, 901 (C. C. A. 2), certiorari denied, 270 U. S. 647.[12]

In this setting, it is apparent that, even assuming petitioner could, in 1926, have qualified under

[11] Section 4 (b) (*infra,* p. 19) defined non-quota immigrants to include such aliens as have been "previously lawfully admitted to the United States, who [are] returning from a temporary visit abroad."

[12] H. Rep. 350, 68th Cong., 1st sess., p. 2, states that "an immigrants, although admissible under the immigration laws, will be excluded from the United States unless he meets the requirements of the new [1924] act."

the seventh proviso to Section 3 of the 1917 Act,[13] he was then inadmissible by reason of the supplementary requirements of Section 13 of the 1924 Act.[14] He did not then possess a visa as required by subsection (a) nor was he eligible for admission without a visa under subsection (b) because of the illegality of his original entry in 1915. Without such admission papers he could not enter. *United States ex rel. Polymeris* v. *Trudell,* 284 U. S. 279. Moreover, being an alien ineligible to citizenship who had originally entered illegally he was barred by subsection (c).

While there can be no doubt, therefore, that petitioner was inadmissible in 1926, we shall briefly answer some of the arguments advanced to the contrary. Petitioner's contention that this application of Section 13 would result in an implied repeal of the seventh proviso and that such a repeal cannot be assumed in the absence of expressed legislative intent (Pet. 30–32), is

[13] While we do not urge the point here, we have some doubt whether petitioner could have acquired "domicile" in the United States, within the meaning of that proviso, in view of his illegal entry. Cf., e. g., *Werblow* v. *United States*, 134 F. 2d 791, 792 (C. C. A. 2); *United States* v. *Kreticos*, 40 F. 2d 1020, 1021 (App. D. C.).

[14] The Immigration Manual (§ 584 at p. 5159) provides, in conformity with Section 25 of the 1924 Act, that the authority of the Attorney General under the seventh proviso may be exercised to waive certain disabilities under Section 3 of the 1917 Act, but not to waive the requirements of Section 13 of the 1924 Act, except in so far as aliens may come within the exceptions therein provided.

squarely disposed of by the terms of Section 25 of the 1924 Act, making admissibility contingent on the alien's meeting the requirements of that act as well as of other immigration laws and by the fact that the advantages of the seventh proviso are still available to aliens otherwise inadmissible, including those ineligible to citizenship, provided that they meet the requirements of Section 13. See fn. 14, *supra*. Thus, for example, a Japanese alien who by reason of physical or mental disability cannot meet the desirability standards of Section 3 of the 1917 Act, can, if he originally entered the United States legally and has been domiciled here continuously for seven years, be readmitted under the seventh proviso by securing admission papers issued under Section 13 (b).

Similarly, there is no foundation for the argument (Pet. 29–30) that the Government discriminates in applying the several requirements of Section 13 to aliens otherwise qualified for admission under the seventh proviso, in that it compels compliance with those requirements of Section 13 applicable to aliens ineligible to citizenship (subsection (c)) but does not similarly compel compliance with the other provisions of Section 13 (subsections (a) and (b)), for, as we have shown, all of the requirements of Section 13 must be met by any alien seeking admission. Thus, an examination of the deportation case files discloses that in not a single instance since the enactment of the 1924 Act has an alien been admitted under the

seventh proviso unless he possessed a proper visa, as required by 13 (a), or came within the exception provided by 13 (b). See also *United States ex rel. Polymeris* v. *Trudell, supra,* in which the aliens involved obviously came within the terms of the seventh proviso, but were held inadmissible by reason of noncompliance with the visa requirement of 13 (a).

Petitioner's final argument—on the basis of which he seeks to assimilate the instant case to *Delgadillo* v. *Del Guercio,* No. 63, O. T. 1947, certiorari granted June 2, 1947—is that his departure and return in December 1926 did not constitute an "entry" into the United States within the meaning of Section 13 of the 1924 Act, because that section is applicable only to "true immigration" and not to so-called border crossing (Pet. 32–34). However, in the *Delgadillo* case the question posed by the petition for a writ of certiorari is whether a fortuitous and involuntary departure and touching upon foreign soil makes the return to the United States an "entry" within the meaning of the immigration laws.[15] Here, in contra-

[15] The petition in *Delgadillo* was concerned with a return from Cuba, where petitioner had landed after his ship was torpedoed. In opposition to the granting of the writ of certiorari, respondent urged (1) that the Cuban landing was not completely unforeseeable and that, therefore, petitioner's return to the United States constituted an entry, and (2) that, in any event, petitioner had intentionally and voluntarily landed on other foreign soil (Panama) before returning to the United States.

distinction, petitioner's departure and return were completely voluntary and intentional, and for his own purposes. And the law is well settled, without any contravening authority, that a witting departure and return to the United States, no matter for how brief a period of time, constitutes the return an "entry" for purposes of all the immigration laws of the United States. See, e. g., *Lewis* v. *Frick,* 233 U. S. 291, 297 (one day trip to Canada); *Guarneri* v. *Kessler,* 98 F. 2d 580 (C. C. A. 5), certiorari denied, 305 U. S. 648 (two or three day trip to Cuba); *Jackson* v. *Zurbrick,* 59 F. 2d 937 (C. C. A. 6) (few hours' trip to Canada); *Ex parte Tatsuo Saiki,* 49 F. 2d 469 (W. D. Wash.); *Cahan* v. *Carr,* 47 F. 2d 604, 605 (C. C. A. 9), certiorari denied, 283 U. S. 862 (one day trip to Tiajuana, or Agua Caliente); *United States ex rel. Medick* v. *Burmaster,* 24 F. 2d 57, 58 (C. C. A. 8) (taxi driver taking passenger to Canada and returning all within one day); *United States ex rel. Natali* v. *Day,* 45 F. 2d 112, 113 (C. C. A. 2) (two day trip to Canada); *United States ex rel. Siegel* v. *Reimer,* 23 F. Supp. 643 (S. D. N. Y.), affirmed, 97 F. 2d 1020 (C. C. A. 2) (two day trip to Canada). Since the foregoing doctrine was firmly established well before the enactment of the 1924 Act, Section 13 must be construed to apply to all immigrants, including the so-called border-crossers. See S. Rep. 352, 64th Cong., 1st. sess., p. 3. That conclusion is buttressed by the very terms of Section 13, for

subsection (b) (*infra*, p. 20), in language similar to that employed in the seventh proviso,[16] permits the readmission, without visas, in such classes of cases and under such conditions as may be prescribed administratively, of aliens who have been legally admitted to the United States and "who depart therefrom temporarily."[17]

2. From the foregoing analysis it is obvious, as both courts below held (R. 14, 79–80), that even if petitioner was denied due process of law at the deportation hearing, no prejudice resulted. The basic facts which were virtually stipulated in the habeas corpus court necessarily and unavoidably required the conclusion that he was deportable. Accordingly, it would serve no useful purpose to

[16] The seventh proviso, under which petitioner asserts his admissibility, applies to aliens "returning after a temporary absence" to an unrelinquished United States domicile of seven consecutive years.

[17] Petitioner argues that subsection (b) refers to "true immigration rather than border-crossing" because it has been held to include departures for extended periods (Pet. 33). However, it does not follow, as petitioner implies, that the provision does not apply to departures of very short duration. Nor is there any foundation in the immigration laws, regulations, or decisions for petitioner's treatment of temporary departures other than so-called border-crossing as "true immigration," with border-crossing as something less than that. As a practical matter, petitioner's classification would, without the benefit of explicit statutory sanction, lead to confusion and uncertainty, for no standards are available to determine when a departure and return crosses the line from the temporary departure or "true immigration" category to the border-crossing group, or vice versa.

remand the cause to the immigration authorities for further hearing because nothing could be there adduced to alter that conclusion. Cf. *Bridges* v. *Wixon*, 326 U. S. 135, 167.

In any event, it is clear that petitioner was given a fair hearing by the immigration authorities. Since he could not follow the proceedings in English, the presiding inspector questioned him through an interpreter whom petitioner several times unqualifiedly assured the inspector he thoroughly understood. Moreover, at the beginning of the hearing, upon questioning by the presiding inspector, petitioner acknowledged that he understood the nature of the charges, which were read to him at that time, and that he understood the hearing was to afford him the opportunity to show cause, if any, why he should not be deported. When the inspector asked whether he wished, according to his right, to be represented by counsel, he said "No," and then affirmed that he was ready and willing to proceed with the hearing at that time.[18]

While it may be that the issues involved in the hearing were somewhat technical, petitioner there conceded he understood them and his assurances are supported by the fact that he appears to be an intelligent and capable business man (R. 44–45). His contentions here notwithstanding (see Pet.

[18] See Immigration Regulation 150.6 (*infra*, pp. 25–26) for requirements to assure alien's knowledge of rights and purpose of hearing.

22–24), he introduced no evidence in the habeas corpus court, other than his own equivocal testimony (see R. 35, 37–39), to dispel the clear impression imparted by the record of the deportation hearing that his waiver of counsel was intelligently made. Moreover, since petitioner did not, after having been clearly advised of his rights and the nature and purpose of the hearing, qualify or explain his waiver in any way, and since he consented to proceed with the hearing forthwith, he is in no position now to urge that he needed more time to appraise his situation (Pet. 26–27), that he was unable to afford counsel (Pet. 22),[19] and that, in view of all the circumstances, counsel should have been assigned.

CONCLUSION

The decision below is clearly correct, and there exists no conflict of decisions. Accordingly, we respectfully submit that the petition should be denied.

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AUGUST 1947.

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[19] From the records of the deportation hearing (Tr. 14, 18) and of the habeas corpus court (R. 49–51), it is not clear that petitioner could not have afforded counsel.

APPENDIX

The seventh proviso to Section 3 of the Immigration Act of February 5, 1917, c. 29 § 3, 39 Stat. 874, 878, 8 U. S. C. 136 (p) provides:

> * * * That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe * * *

The Immigration Act of May 26, 1924, c. 190, 43 Stat. 153 (8 U. S. C. 201–231) provides in pertinent part:

> SEC. 4 [8 U. S. C. 204]. When used in this Act the term "non-quota immigrant" means—
>
> * * * * *
>
> (b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;
>
> * * * * *
>
> (d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; or
>
> (e) An immigrant who is a bona fide student at least 15 years of age and who

seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn.

SEC. 13 [8 U. S. C. 213]. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

SEC. 25 [8 U. S. C. 223]. The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

Executive Order 4476 of July 12, 1926 (set out in Immigration and Nationality Laws and Regulations as of March 1, 1944 at pp. 234–237) provided in part as follows:

> * * * I hereby prescribe the following regulations governing the entry of aliens into the United States:
>
> * * * * * *
>
> (2) Aliens who have previously been admitted legally into the United States, have departed therefrom and returned within six months, not having proceeded to countries other than Canada, Newfoundland, St. Pierre, Miquelon, Bermuda, Mexico, Cuba, and other Islands included in the Bahama and Greater Antilles groups, are not required to present passports, visas, or permits to reenter.
>
> (3) Aliens, other than those specified in (2) above, who have previously been admitted legally into the United States, have

departed therefrom, and are returning from a temporary visit abroad, may present, in lieu of immigration visas, permits to reenter, issued pursuant to Section 10 of the Immigration Act of 1924.

The Immigration Rules of July 1, 1925 (set out in Immigration Laws and Rules of July 1, 1925) provided in part as follows:

RULE 3, SUBDIVISION F

PARAGRAPH 1. No immigrant, whether a quota immigrant or non-quota immigrant, of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration official, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer: *Provided,* That (a) aliens who have been previously lawfully admitted to the United States and who are returning from a temporary visit of not more than six months to Canada, Newfoundland, Bermuda, St. Pierre, Miquelon, Mexico, and islands included in the Bahama and Greater Antilles groups, or such aliens who are returning from a temporary visit to any other foreign country and who are in possession of a permit to reenter the United States issued in accordance with the provisions of section 10 of the immigration act of 1924, and (b) children born subsequent to the issuance of an immigration visa to the accompanying parent, if otherwise admissible, shall be permitted to enter the United States without an immigration visa.

SUBDIVISION R

Aliens and citizens habitually crossing boundaries—Identification

PARAGRAPH 1. With a view to avoiding delays and embarrassment in cases of aliens and citizens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. The applicant for such a card shall be required to furnish two unmounted photographs of himself, of appropriate size, for attachment to the card, and shall supply the data necessary to fill out the card in complete form. To guard against the use of the card by any other person than the one to whom furnished (through its being lost or stolen or otherwise improperly acquired) the official issuing the card shall require the applicant to sign his name partly on the margin of the photograph and partly on the body of the card itself: *Provided,* That such card may be taken up or canceled at any time within the discretion of the proper immigration official.

RULE 24, SUBDIVISION B

PARAGRAPH 1. An alien previously lawfully admitted to the United States for permanent residence who is about to depart temporarily therefrom and who desires a permit to reenter may, not less than 30 days prior to his departure from the United States, file with the Commissioner General of Immigration a typewritten ap-

plication (Form 631), stating under oath (1) name, date and place of birth of the applicant; (2) time and manner of arrival in the United States and port where previously legally and permanently admitted; (3) place of residence in the United States and length of such residence; (4) whether married or single, and, if married, name and address of husband or wife; (5) applicant's business and where located, or, if employed, name and address of employer and nature of occupation; (6) applicant's personal description; (7) when and how alien will depart from the United States, countries to be visited, and period he will be absent; and (8) reasons for applicant's visit abroad; provided that if the visit abroad is for the transaction of business as the agent or other representative of an individual, partnership, or corporation residing in or having its place of business in the United States, a letter from such individual, partnership, or principal officer of the corporation stating the object and purpose of alien's visit shall be filed with the application and be made part thereof. Applicant shall furnish with such application two unmounted, individual, front-view photographs of himself, 2½ by 2½ inches in size, which shall be signed by the applicant on the front in such manner as not to obscure the features and in the presence of the officer administering the oath. If the Commissioner General finds that the alien has been legally admitted to the United States for permanent residence and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue such permit to the applicant, which shall be valid for the time therein

specified. Such permit will, however, have no effect under the immigration laws except to show that the alien to whom issued is returning from a temporary visit abroad. A separate application must be submitted by each alien.

Immigration Regulation 150.6 (8 C. F. R.) proprives in pertinent part:

> (c) *Hearing; procedure; notice of charges.*—At the beginning of a hearing under a warrant of arrest, the presiding inspector shall (1) permit the alien to inspect the warrant of arrest and inform him of the charges contained therein by repeating them verbatim and explaining them in language which will clearly convey to the alien the nature of the charges he must answer; (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel; (3) place the alien under oath or affirmation; (4) advise the alien of the penalty for perjury; and (5) enter of record as an exhibit, indentified by number, the formal warrant of arrest, or a decoded copy of the telegraphic warrant if hearing is held thereunder. The presiding inspector shall further advise the alien of the provisions of paragraph (g) of this section concerning applications for the privilege of departure in lieu of deportation or for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended, in all cases except those in which the alien is charged with being subject to deportation upon one of the grounds mentioned in section 19 (d) of the said Act. A continuance of the hearing

for the purpose of obtaining counsel shall not be granted more than once, unless sufficient cause for the granting of more time is shown.

(d) *Hearing; representation by counsel.*—If counsel be selected, he shall be permitted to be present during the hearing, to offer evidence to meet any evidence presented or adduced by the Government, and to cross-examine witnesses called by the Government. Counsel shall be permitted to state his objection succinctly, and they shall be entered on the record. Argument of counsel in support of his objections shall be excluded from the record. Counsel, however, may submit such argument in the form of a brief to accompany the record.

(e) *Hearing; where representation by counsel waived.*—If representation by counsel be waived, the alien shall be permitted to offer evidence to meet any evidence presented or adduced by the Government, to cross-examine witnesses called by the Government, and to make objections, which shall be entered on the record, but his arguments in support of the objections may, in the discretion of the presiding inspector, be excluded from the record, in which event, however, the alien shall be permitted to submit such arguments in writing to accompany the record.

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